U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13908165

Date: JAN. 29, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an administrative services company,[1] seeks to employ the Beneficiary as a clerk. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the continuing ability to pay the proffered wage.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an

[1] On the petition, the Petitioner describes itself as an administrative services company. However, on its 2017 federal tax return, it described itself as providing consulting services, including business management solutions, event coordination services, property management, and IT support. The Petitioner must resolve ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).
In any future filings, the Petitioner must establish what services it actually provides.

[2] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is August 29, 2017. *See* 8 C.F.R. § 204.5(d).

immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director concluded that the Petitioner did not establish its continuing ability to pay the proffered wage. The proffered wage is listed as $35,651 on the labor certification, and it is listed as $40,000 per year on the petition.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.[3]

The record contains an IRS Form 1099, Miscellaneous Income, indicating that the Petitioner paid the Beneficiary $17,500 in 2017. It also contains a paycheck for the Beneficiary showing that the Petitioner paid him $33,592.68 in gross wages through November 21, 2019. The record does not indicate that the Petitioner paid the Beneficiary any wages in 2018. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid to the Beneficiary.

The Petitioner is a single-member limited liability company (LLC) taxed as a sole proprietorship. The Petitioner submitted its member's 2017 IRS Form 1040, Schedule C, which states a net loss[4] of $9,493. The net loss is insufficient to pay the difference between the wages paid to the Beneficiary and the proffered wage in 2017.[5] Thus, the Director determined that the Petitioner did not establish its ability

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[3] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-946 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

[4] For an LLC taxed as a sole proprietorship, net income/loss is reported on its member's IRS Form 1040, Schedule C, at line 31.

[5] Although the Director incorrectly calculated the Petitioner's net current assets in 2017, the error does not affect the ultimate outcome of the appeal.

to pay the proffered wage for 2017. The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2018 onward as required by 8 C.F.R. § 204.5(g)(2).

On appeal, the Petitioner submits a letter from a certified public accountant (CPA)[6] stating that the Petitioner had sufficient net current assets[7] to pay the difference between the wages paid to the Beneficiary and the proffered wage in 2017 and 2019, and the full proffered wage of $40,000 in 2018. He states that the Schedule C does not contain a balance sheet to report the assets and liabilities of the Petitioner, and he submits an unaudited balance sheet for the Petitioner dated November 30, 2019. The balance sheet indicates that the Petitioner had net current assets of $51,422 in 2017 and $45,294 in 2018.[8] The balance sheet also shows projected/estimated net current assets for the Petitioner of $16,879 in 2019.[9] The CPA's letter and a corresponding bank statement also confirm the Petitioner's $16,572.05 balance in its checking account as of November 29, 2019, and the CPA estimates that the Petitioner would have no current liabilities for 2019. However, as further detailed below, the Petitioner did not establish that it has the ability to pay from the priority date in 2017 onward.

As noted above, the CPA's letter is supported by an unaudited balance sheet. However, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). The CPA's letter does not indicate that he audited the Petitioner's balance sheet. Unaudited financial statements are the representations of the Petitioner's management and are insufficient to demonstrate the ability to pay the proffered wage.

As noted above, the CPA's letter is also supported by the Petitioner's bank statements. However, as indicated by the Director in his decision, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) that are required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Further, bank statements show the amount in an account on a given date and cannot show the continuing ability to pay a proffered wage. The Petitioner's bank statements are insufficient to demonstrate the Petitioner's continuing ability to pay the proffered wage.

On appeal, the CPA also urges us to consider the assets of the Petitioner's sole member as evidence of the Petitioner's ability to pay the proffered wage. As noted by the CPA, the LLC is a disregarded entity for tax purposes, and its activities are reflected on its member's federal tax return. However, because an LLC is a separate and distinct legal entity from its members, the assets of its members cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the

[6] The CPA did not prepare the Petitioner's 2017 federal tax return.

[7] Net current assets are the difference between a petitioner's current assets and current liabilities. Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[8] The Petitioner's year-end bank statements for 2017 and 2018 confirm cash balances reflecting these amounts.

[9] The appeal was filed on December 20, 2019. Thus, the Petitioner's financial results for the full calendar year were not available on the date of filing the appeal.

governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Since the Petitioner did not submit audited financial statements or annual reports for 2017 pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the 2017 IRS Form 1040, Schedule C, submitted by the Petitioner, the Petitioner's net current assets cannot be ascertained for 2017. Because the Petitioner had a net loss reflected on its federal tax return for 2017, it has not established its ability to pay the difference between the wages paid to the Beneficiary and the proffered wage in 2017. Further, the Petitioner did not submit federal tax returns, audited financial statements, or annual reports for 2018 onward. Thus, it has not established its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

We may consider evidence of a petitioner's ability to pay beyond its net income and net current assets, including such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-615 (Reg'l Comm'r 1967). Here, the Petitioner was organized in 2010. However, it had minimal gross income in 2017, and it indicated that it had no employees at the time of filing the petition. Further, it has not established the growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation in its industry. Therefore, based on the totality of the circumstances, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

The appeal will be dismissed because the Petitioner did not establish its continuing ability to pay the proffered wage.

III. BONA FIDE JOB OPPORTUNITY

Although not addressed by the Director in his decision, the *bona fide* nature of the job opportunity is not clear. The Petitioner answered "No" at part C.9 of the labor certification application, which asks whether there is "a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators [of the Petitioner], and the alien." The regulation at 20 C.F.R. § 656.17(l) states that if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the beneficiary, the petitioner in the event of an audit must be able to demonstrate the existence of a *bona fide* job opportunity (i.e., that the job is available to all U.S. workers).[10] By signing the labor certification application, the Petitioner attested to the *bona fides* of the job opportunity.

[10] If a petitioner answers "yes" to Part C.9 of the ETA Form 9089, DOL may audit the labor certification and request the following documentation from the petitioner:

> (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
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> (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

Here, the sole member of the Petitioner is married to [redacted] and the Beneficiary's mother is [redacted] The similar names indicate a possible familial relationship between the Petitioner and the Beneficiary. Further, the worksite listed on the labor certification for the offered job is a residential home located at [redacted] MD [redacted] This address is also listed as the residential address of the Petitioner's sole member on his 2017 individual tax return and as the Beneficiary's address on his college transcript issued by the University [redacted] in 2016. The similar addresses indicate that the Beneficiary may have shared a residence with the Petitioner's sole member. Based on these facts in the record, it is not clear that the job opportunity is *bona fide* due to an undisclosed relationship between the Petitioner and the Beneficiary.[11] If the Beneficiary is related to the Petitioner's sole member, their relationship casts doubt on the *bona fides* of the job opportunity.[12] In any future filings, the Petitioner must establish the *bona fides* of the job opportunity and the position's availability to U.S. workers. If the Petitioner willfully misrepresented the *bona fide* nature of the job opportunity, the labor certification may be invalidated. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS to invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact).[13]

ORDER: The appeal is dismissed.

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(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

20 C.F.R. § 656.17(l).

[11] The Petitioner must resolve ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

[12] The Act and the regulations authorize USCIS to further examine the availability of an offered position to U.S. workers. USCIS must "investigat[e]… the facts in each case" and determine "whether the facts stated in the petition are true." Section 204(b) of the Act, 8 U.S.C. § 1154(b). In addition, we may deny petitions accompanied by labor certifications that violate DOL regulations. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under the DOL regulation at 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment).

[13] A finding of willful misrepresentation of material fact against a petitioner or beneficiary requires the following elements:

- The petitioner or beneficiary procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner or beneficiary made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policymanual; *see also Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *Matter of Kai Hing Hui,* 15 I&N Dec. 288 (BIA 1975).